

IN THE SUPREME COURT OF ONTARIO

IN THE DIVISIONAL COURT OF THE HIGH COURT
OF JUSTICE FOR ONTARIO

IN RE THE ONTARIO HUMAN RIGHTS CODE, R.S.O.
1970, CHAPTER 318 AS AMENDED:

AND IN RE A COMPLAINT BY MRS. DOROTHY
CUMMINGS THAT HER DAUGHTER GAIL CUMMINGS
WAS DENIED ACCOMMODATION, SERVICES OR
FACILITIES OR DISCRIMINATED THEREIN ON AC-
COUNT OF HER SEX BY THE ONTARIO MINOR
HOCKEY ASSOCIATION, CONTRARY TO SECTION 2
(1) (a) and (b) OF THE ONTARIO HUMAN RIGHTS
CODE.

APPELLANT'S STATEMENT

1. This is an appeal by the Ontario Minor Hockey As-
sociation from the decision of Professor Mary A. Eberts dated
the 31st day of October, 1977 upon a complaint by Mrs.
Dorothy Cummings that her daughter, Gail Cummings, had been
discriminated against on account of her sex by the Ontario
Minor Hockey Association, declaring in effect that such dis-
crimination had occurred contrary to Section 2 (1) (a) of the
Ontario Human Rights Code.

- (i) Notice of Appeal, Appeal Book p. 1;
- (ii) Decision of Professor Mary A. Eberts,
Appeal Book p. 3;
- (iii) Reasons for Decision, Appeal Book,
p. 4 - 24.

I

FACTS

2. The Appellant, the Ontario Minor Hockey Association,
organizes boys' hockey teams, basically in Southern Ontario,
except for Metropolitan Toronto. There are some 130,000
players under 19 years of age currently involved.

3. Gail Cummings was 10 years old in the winter of 1976-77 when her playing card was not approved by the office of the Ontario Minor Hockey Association because she was a girl.

EVIDENCE: Page 64 LL 3-8

4. The Huntsville hockey team for which she had played four games wanted to remain a member of the Ontario Minor Hockey Association and would not allow her to play any further.

EVIDENCE: Page 41 L. 6,
Page 128 LL 13-26

5. There are possibly some 10,000 girls playing hockey in Ontario.

EVIDENCE: Page 113 L 18

6. The Ontario Women's Hockey Association has no intention now to promote integrated hockey.

EVIDENCE: Page 110 L 2

7. Girls were accepted in the Huntsville Minor Hockey House League. Gail Cummings was the only girl playing on a boys' team in Huntsville and the only girl known to want to play on a boys' team in that area.

EVIDENCE: Page 294 LL 7-11

8. There was no evidence of demand for integrated hockey.

EVIDENCE: Page 223 L 24
Page 267 L 24
Page 294 L 7

9. The Ontario Minor Hockey Association accepts for membership, any team representing a community which is prepared to abide by the rules. Each team has a vote at a meeting held annually. Integrated hockey has never been proposed at a regular annual meeting.

EVIDENCE: Page 226 L 3
Page 227 L 7



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10. The Ontario Minor Hockey Association is affiliated with the Ontario Hockey Association which organizes hockey generally in Southern Ontario under the Canadian Amateur Hockey Association.

EVIDENCE: Page 237 & 238

11. The rules of the Canadian Amateur Hockey Association require that all members including the Ontario Minor Hockey Association, be restricted to male hockey players.

EVIDENCE: Page 266 L 19

12. There is no money paid directly to the Ontario Minor Hockey Association by the Government.

EVIDENCE: Page 229 L 13

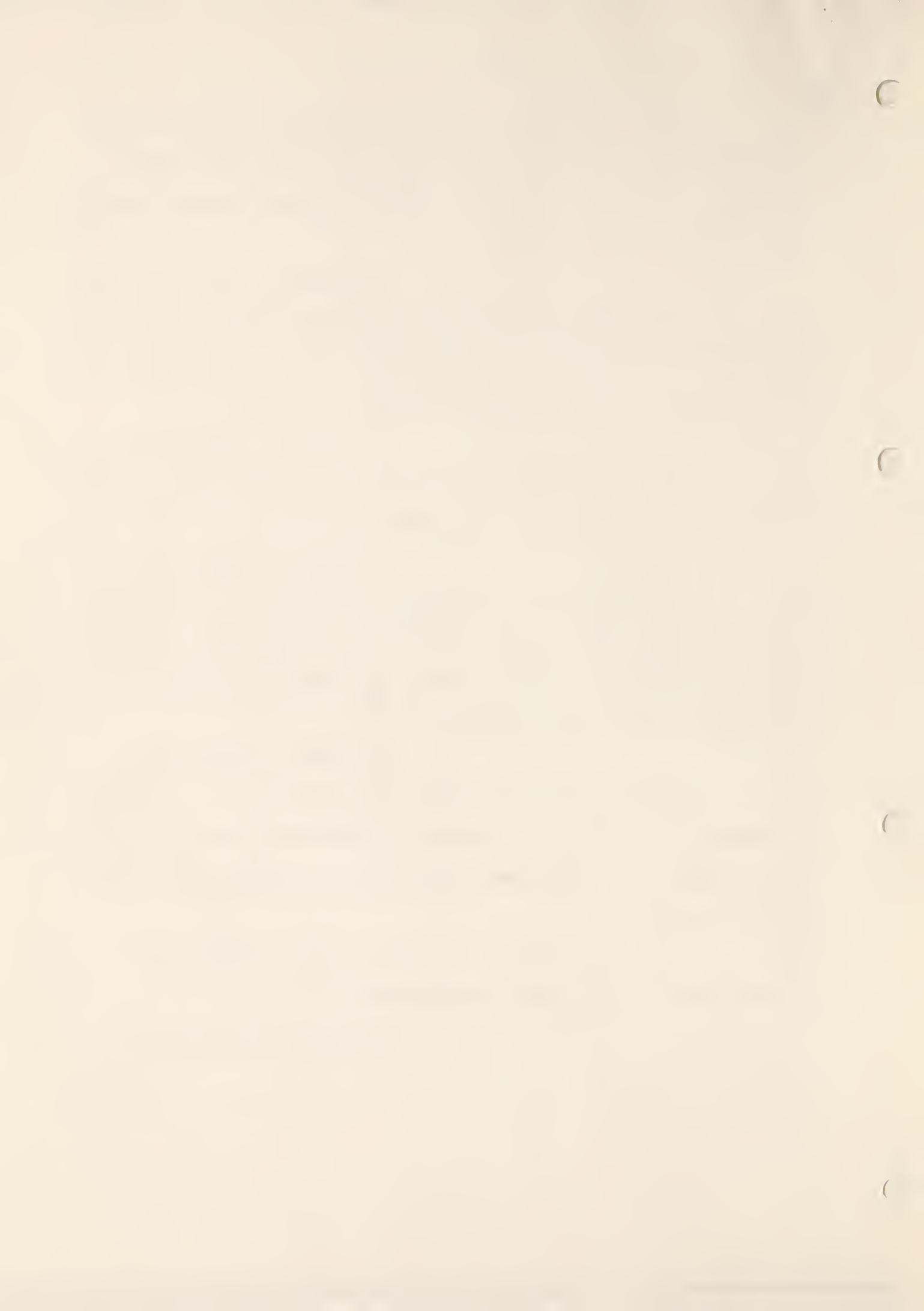
13. The Ontario Minor Hockey Association is a non-profit, volunteer association which organizes and supervises its member teams in accordance with the rules and regulations laid down each year at its annual meeting.

EVIDENCE: Page 226 L 3

14. The Ontario Minor Hockey Association is not opposed to female participation in hockey but takes the position that female hockey and integrated hockey must be organized by some other organization.

15. There is substantial hockey played outside the influence of the Ontario Minor Hockey Association.

EVIDENCE: Page 227 L 13



II

POINTS INTENDED TO BE ARGUED

16. The main issue in the appeal is whether or not the Ontario Minor Hockey Association comes under the Ontario Human Rights Code.

17. The Appellant submits that the Ontario Minor Hockey Association is a private or domestic organization not coming under the Code.

18. The Appellant submits that the Ontario Human Rights Code passed in 1962, is a "Code" replacing four existing statutes, dealing with employment and accommodation and not affecting amateur sport.

19. The Appellant submits that the Ontario Minor Hockey Association, being an unincorporated association, is not a "person" within the meaning of person in the Ontario Human Rights Code.

20. The Appellant submits that Gail Cummings, being an infant, has no status under the Code, and there is no authority allowing the mother to pursue a complaint on her behalf.

Appeal Book Page 34, Recommendation Number 73

21. The Appellant submits that it is reasonable in law to differentiate as between boys and girls when being involved in sporting activities.

22. It is submitted:

- (a) that "service" in Section 2 (a) of the Code has to be read in conjunction with "accommodation or facilities";

- (b) the services tendered by the Appellant are not tendered to the public but to teams of boys, provided such teams agree to follow the rules of the association;
- (c) that the Ontario Minor Hockey Association is conferring a benefit on boys, not discriminating against girls;
- (d) that the Ontario Minor Hockey Association has the right to associate for the purposes it does;

Appeal Book Page 25

- (e) that the Learned Professor's decision is beyond her jurisdiction and requires the Ontario Minor Hockey Association to do things beyond its jurisdiction;
- (f) that the Learned Professor's decision did not take proper cognizance of the 1977 report on human rights in Ontario, prepared by the Ontario Human Rights Commission and in particular:
 - (i) its discussion of "services and facilities" on pages 48 and 70

Appeal Book Page 27 & 31

- (ii) its discussion of the word "sex" on page 68

Appeal Book Page 29

- (iii) recommendation number 61 on page 103

Appeal Book Page 33.

III

THE LAW

23. On the issue of the Ontario Minor Hockey Association being private or domestic:

- (i) Race Relations Board v. Applen, 1973, 2 all E.R. 1190;
- (ii) Boduch v. Harper, 1976, 10 O.R. 755;
- (iii) Folten and Governing Council of the University of Toronto, 1976, 8 O.R. Page 749.

24. On the issue of conferring a benefit, the Court will be respectfully referred to:

- (i) Her Majesty the Queen and Violet Willington and Her Majesty the Queen and Michael Joseph MacKay, a decision of the Appellate Division of the Supreme Court of Alberta rendered on June 20th, 1977;
- (ii) Regina vs. Davis, reported in 1977, 35 C.C.C., Page 464.

25. On the issue of the Ontario Minor Hockey Association being an unincorporated association and not encompassed by the Code, the Court will be respectfully referred to:

- (i) The Interpretation Act, R.S.O. 1970, Chapter 225, Section 30 (28);
- (ii) The Statutory Powers Procedure Act, R.S.O. 1971, Chapter 47 and in particular 1 (2);
- (iii) Ladies of the Sacred Heart v. Armstrong Point Association, 1961, 36 W.W.R., 364;
- (iv) International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Building Material Construction and Fuel Truck Drivers, Local Number 213 v. Therien, 1960, S.C.R., 265.

26. On the issue of whether or not the "services" of the Ontario Minor Hockey Association are rendered to the public, the Court will be respectfully referred to:

- (i) Beattie vs. Governors of Acadia University, 1977, 72 D.L.R., Page 716.

27. On the issue of reasonableness of the alleged discrimination, the Court will be respectfully referred to:

- (i) Hanson vs. Ontario University Athletics Association, 1976, 11 O.R., 193.

28.

Reference will be made to:

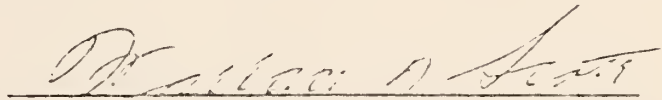
- (i) The Fair Accommodation Practices Act (Ontario), first enacted in 1954;
- (ii) The Fair Employment Practices Act (Ontario), first enacted in 1951;
- (iii) The Female Employees' Fair Accommodation Act (Ontario), first enacted in 1951;
- (iv) The Ontario Anti-Discrimination Act (Ontario), first enacted in 1958;
- (v) The Canadian Bill of Rights, R.S.C. 1970, Chapter 35, Section 1 (e);
- (vi) The Athletic Control Act, R.S.O. 1970, Chapter 35 and in particular Sections 7 and 12;
- (vii) The Sex Discrimination Act, 1975 of Great Britain, 1975, Chapter 65.

IV

THE ORDER SOUGHT

29. It is submitted that the appeal should be allowed, the decision of Professor Mary A. Eberts set aside and the Respondent's application dismissed with costs.

All of which is respectfully submitted.



Wallace A. W. Scott

of Counsel for the Appellant,
the Ontario Minor Hockey
Association.



IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

Evans, C.J.H.C., Steele and Carruthers, JJ.

IN RE THE ONTARIO HUMAN)	
RIGHTS CODE, R.S.O. 1970, CHAPTER)	
318 AS AMENDED)	<u>W. A. Scott, Q.C.</u>
)	<u>and D. Gemmill.</u>
AND IN RE A COMPLAINT BY MRS.)	for the Ontario Minor
DOROTHY CUMMINGS THAT HER)	Hockey Association
DAUGHTER GAIL CUMMINGS WAS)	
DENIED ACCOMMODATION,)	<u>John I. Laskin.</u>
SERVICES OR FACILITIES OR)	for the Ontario Human
DISCRIMINATED THEREIN ON)	Rights Commission
ACCOUNT OF HER SEX BY THE)	
ONTARIO MINOR HOCKEY)	
ASSOCIATION CONTRARY TO)	
SECTION 2 (1) (a) and (b) OF THE)	
ONTARIO HUMAN RIGHTS CODE.)	<u>Heard: June 20, 1978.</u>

EVANS, C.J.H.C.:-

This is an appeal by the Ontario Minor Hockey Association from the decision of Professor Mary A. Eberts dated the 31st day of October, 1977, following a complaint by Mrs. Dorothy Cummings that her daughter, Gail Cummings, had been discriminated against on account of her sex by the said appellant, declaring that the alleged discrimination had been established and was contrary to s. 2(1)(a) of the Ontario Human Rights Code.

The facts which gave rise to this matter are detailed at considerable length in the reasons of the learned chairman of the Board of Inquiry and I do not propose to repeat them other than in a very summary form.

Gail Cummings is a girl who was 10 years old on September 30, 1976, at which time an advertisement was published in a Huntsville newspaper advising



that applications would be received for registration of boys and girls in the Huntsville Minor Hockey Association. She registered for the house league competition and became a goalie for one of the Atom teams. A second advertisement on October 21, 1976, requested applications for "All-Star Tryouts". The All-Star team was chosen from the house league and would be the town representative in the O.M.H.A. playoffs. Gail Cummings was selected for the All-Star team. She signed the necessary player registration certificate and it was forwarded to the O.M.H.A. The certificate, when issued, grants certain privileges to the holder and makes the holder subject to the rules, regulations and decisions of the C.A.H.A., its Board of Directors, its branches and/or divisions. She had played four games with the All-Stars when the coach of that team was informed that her certificate had not been approved and that she was no longer eligible to continue playing with the team. The O.H.A. constitution provides in s. 202 that any team or team official who allows a player to participate in a game without an approved registration certificate is subject to possible suspension for a period of up to one year. A complaint was subsequently filed and the inquiry resulted.

It is not contended in this Court that Gail Cummings was refused registration with the O.M.H.A. for any reason other than her sex. She met the necessary qualifications with respect to age, residency and amateur status and her coach was satisfied that her ability qualified her for the All-Star team.

The O.M.H.A. is affiliated with the Ontario Hockey Association and through it with the Canadian Amateur Hockey Association. These latter two associations accept for registration male persons only and the constitution of O.M.H.A. itself states that one of the association's objects is "to promote, encourage and govern . . . hockey for boys in the Province of Ontario". The

Association according to the foreward in the Rules and Regulations booklet:

"is the result of many years of hard work by men sincerely interested in the welfare of the boys of Ontario and in the game of hockey."

It resulted from a merger of the Ontario Midget and Bantam Hockey Association with the Ontario Juvenile Hockey Association. There is no evidence that any of these associations ever sponsored integrated hockey teams and at present some 130,000 boys under 19 years of age are involved. There are, of course, many young people, both boys and girls, who play hockey outside the jurisdictional influence of the O.M.H.A. and the O.H.A.

The O.M.H.A. states that it does not oppose hockey for girls or even integrated teams, but that, at the present time, it does not organize any hockey competitions for girls and would be opposed to the operation under its auspices of integrated hockey teams. Other organizations, if interested, could become involved in such projects but they do not fall within the ambit of interest of the O.M.H.A. It pointed out that house leagues, such as the one in which Gail played in Huntsville, are purely local organizations and are not under the jurisdiction of the O.M.H.A.

There are a few ladies' and girls' hockey teams in Ontario but they have no affiliation with the appellant or the O.H.A. It is not disputed that there is no girls' team in the immediate area of Huntsville for which Gail would be eligible or which would provide the level of competition suitable to her ability. The Ontario Women's Hockey Association has no present intention to promote integrated hockey and evidence does not disclose any demand for it.

The issue before this Court is not whether Gail Cummings should be allowed to play hockey on a girls' team or with integrated teams, but whether the

O.M.H.A., by refusing to issue to her a registered player card, is guilty of a breach of the Ontario Human Rights Code by refusing to accept her registration on the ground of her sex.

The particular section alleged to be contravened is as follows:

2.-(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,

- (a) deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted; or
- (b) discriminate against any person or class of persons with respect to the accommodation, services or facilities available in any place to which the public is customarily admitted,

because of the race, creed, colour, sex, marital status, nationality, ancestry or place of origin of such person or class of persons or of any other person or class of persons."

The determination of that issue depends upon the interpretation to be attached to the language of the section. I state at the outset that the language of the section leaves much to be desired, and while I agree that the language in a statutory code of this nature should be given a wide and liberal interpretation, I do so with the caveat that the language should not be distorted to arrive at a conclusion which will tend to defeat the purpose for which the Ontario Human Rights Code was presumably enacted.

The preamble to the Code reads as follows:

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all

members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is public policy in Ontario that every person is free and equal in dignity and rights without regard to race, creed, colour, sex, marital status, nationality, ancestry or place of origin;

AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature;

AND WHEREAS it is desirable to enact a measure to codify and extend such enactments and to simplify their administration;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

The history of human rights legislation in Ontario is fairly recent and is based on The Fair Employment Practices Act, 1951, The Female Employees' Fair Remuneration Act, 1951, The Fair Accommodation Practices Act, 1954 and The Ontario Anti-Discrimination Act, 1958. The Ontario Human Rights Code was originally enacted in 1962 as a measure to codify and extend the existing enactments setting out the principles of human equality and to provide an informal procedure for the attainment of those objectives.

In attempting to reach a conclusion as to the meaning of the words: "accommodation, services or facilities available in any place to which the public is customarily admitted" the learned chairman of the Inquiry Board, because of the absence of definition of those words in the Code, was driven to a search of several dictionaries for definitions which she considered appropriate. I am in agreement with her conclusion that the words "services and facilities" should not be read

ejusdem generis with the term "accommodation". I am satisfied that they should not be given a narrow construction which would limit them to "services or facilities" usually provided by restaurants, public libraries, theatres, dance halls, arenas and parks, to mention only a few.

On the basis of my interpretation of s. 2(1)(a) of the Code, I have concluded that the prohibition is against discrimination in the provision of accommodation, services or facilities available to the public in any place to which the public is customarily admitted. The Code does not seek to regulate organizations and associations of a private nature, although unquestionably many of them may be discriminatory in the sense that they refuse membership because of race, creed or the other factors referred to in s. 2. What it does seek is the prevention of discrimination because of certain enumerated factors to facilities open to all in those places to which the public have customarily a right of admission. If the accommodation, services or facilities are not available to the public in the sense that they are not open to the public generally, although provided in a place to which the public is customarily admitted, then they fall outside the ambit of the Code.

The evidence indicated that the O.M.H.A. is a non-profit volunteer organization whose objects are to promote, encourage and govern hockey for boys in certain age groups in Ontario, to protect the mutual interest of its members, to carry out competitions for championships with the aim of inculcating in the boys certain ideals which will make them good citizens. Its purpose is obviously designed to encourage participation by as large a number of boys as possible and to equalize the level of competition.

In my view, Professor Lberts erred in concluding that the facilities of the O.M.H.A. was open to the public. Whatever service the O.M.H.A. renders in operating competitions, conducting referee and coaching clinics is not a service extended to the public, but is a service extended to and to the advantage of boys who fall within the age category of those groups which they supervise. The fact that the competitions are held in arenas that are publicly owned or to which the public are admitted does not, in my view, make the service rendered by the O.M.H.A. a service to the public. The evidence indicates that the teams engaged in hockey competitions are responsible for the payment of ice time and that O.M.H.A. has nothing to do with the arena or the sale of tickets, although admittedly it receives a portion of the proceeds in order to operate the organization. A reasonable view of the activities carried on by the O.M.H.A. discloses that it supplies organizational assistance to boys' hockey teams, but does not discriminate against girls. It is a facility capable of being used by boys only. I am not satisfied that the provision of a benefit for boys is necessarily and, in all cases, discrimination against girls. The facility offered by O.M.H.A. is a structured programme for the promotion of boys' hockey - it is not a facility available for girls' hockey or integrated hockey or even hockey in general, but a facility restricted to a specific objective, that is, hockey for boys within certain age groups. Surely a volunteer organization of this nature has the right to limit the scope of its activities and cannot be compelled to provide a "facility" which it has no desire to undertake; for which there is no great demand and the implementation of which may well destroy an organization which has contributed much to the development of young boys in this Province. I am not prepared to hold that the Legislature in enacting s. 2 of the Ontario Human Rights Code had the intention to impinge on the right of citizens to form athletic associations which are not basically public or to restrict the freedom of choice in personal associations. The

appellant was providing a service or a facility which was available, that is, capable of being used or taken advantage of by boys. The limitation on availability of the facilities provided by O.M.H.A. does not become discriminatory because some of the activities supervised and organized by the Association are carried out in a hockey arena which clearly is a place to which the public is customarily admitted. In this case, the place where the activity is carried on is not the dominant factor; it is the service or facility available which governs. Counsel for the appellant argued vigorously that the Code had no application to a private unincorporated organization engaged in the promotion of amateur sports. I do not consider it necessary to deal with the several issues involved in that submission which I have stated in rather abbreviated form. My failure to do so does not indicate either a lack of merit or approval.

I wish to thank counsel for their excellent presentations. There is a lack of judicial authority relative to the interpretation of the Code. The English cases cited have been of little assistance as they are based on a statute differently worded. While the American cases involve constitutional amendments which, of necessity, influence their decisions.

I find that the services or facilities provided by the O.M.H.A. are not open to be made use of by the public at large, but are accessible to those who qualify under the rules and regulations of the O.M.H.A. and as girls do not qualify, the refusal to grant Gail Cummings a registration card in order to compete in competitions supervised by the O.M.H.A. does not breach s. 2 of the Ontario Human Rights Code.

In the result, the appeal is allowed, the decision of Professor Mary A.

Eberts is set aside and the respondent's application dismissed. I do not consider this matter to be a case for the awarding of costs.

Gregory T. Brown
(Attorney)
Stark

/db

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

Evans, C.J.H.C., Steele and Carmichael, J.J.

IN RE THE ONTARIO HUMAN
RIGHTS CODE, R.S.O. 1970, CHAPTER
318 AS AMENDED

AND IN RE A COMPLAINT BY MRS.
DOROTHY CUMMINGS THAT HER
DAUGHTER GAIL CUMMINGS WAS
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SECTION 20(a) and (b) OF THE
ONTARIO HUMAN RIGHTS CODE

J U D G M E N T

Evans, C.J.H.C.

*Released
Aug 15/78
Superior Court*

